IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

JODY BUTLER,	}	
	}	
Plaintiff,	}	
	}	CIVIL ACTION NO.
v.	}	
	}	01-AR-2415-M
HOMES OF LEGEND, INC.,	}	
	}	
Defendant.	}	

MEMORANDUM OPINION

The court has before it a motion by defendant, Homes of Legend, Inc. ("Homes of Legend"), to compel the binding arbitration of the above-styled wage and hour claim filed in this court by plaintiff, Jody Butler ("Butler"). The motion was set on this court's regular motion docket on November 16, 2001. Movant did not appear for oral argument. Butler was an employee of Homes of Legend. He invokes the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* He does not deny signing the arbitration agreement that is required of all Homes of Legend employees but argues that the agreement is not enforceable.

The court finds the following reasons why this particular arbitration agreement cannot be enforced against Butler:

1. The agreement provides that all controversies between the signatories shall be settled "under common law arbitration." The agreement is to be construed against the drafting party, in this instance, Homes of Legend. This court is, of course, aware of the Federal

Arbitration Act ("the FAA"), 9 U.S.C. §§ 6 et seq., but this court is unfamiliar with anything called "common law arbitration," and has been unable to find such a common law concept in either *Blackstone's Commentaries* or in *Black's Law Dictionary*. The written agreement between Butler and Homes of Legend does not mention the FAA; and Homes of Legend nowhere invokes the FAA. The fact that Homes of Legend makes a pass at suggesting that its business somehow involves interstate commerce is not the equivalent of an invocation of the FAA. In other words, Homes of Legend has not given this court any reason for asserting jurisdiction over its motion.

If jurisdiction can be intuited, and if the law of Alabama provides the factual circumstances to prove the "substantial effect" on interstate commerce that makes an arbitration clause enforceable under the FAA (that is, if the FAA applies when not invoked), this case would be controlled by *Sisters of Visitation v. Cochran Plastering Co.*, 775 So. 2d 759 (Ala. 2000), which was reinforced as recently as last week, by *Alternative Financial Solutions v. Colburn*, ____ So. 2d ____, 2001 WL 1451106 (Ala. November 16, 2000). If Homes of Legend had invoked the FAA, an evidentiary hearing to determine the "effect," if

any, on interstate commerce of the relationship between Butler and Homes of Legend would be in order. But, on the face of the present motion, any effect on interstate commerce is inconsequential. The allegations relating to interstate commerce are boilerplate. They fit almost any employer.

2. This particular agreement calls for each party to "bear the expense of its own arbitrator and equally bear the expense of the umpire and of the arbitration." In *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465 (D.C. Cir. 1997), the District of Columbia Circuit held that an employer cannot require an employee both to arbitrate all disputes and to pay any part of the arbitrator's fees. That court found no reason to believe that *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647 (1991), can be construed to suggest that the arbitration of statutory claims can be made mandatory in the absence of an employer agreement to pay the fees. The District of Columbia Circuit reasoned that public policy, as well as "due process," confer both substantive rights and a reasonable right of access to a neutral forum in which those rights can be vindicated—rights that necessarily lead to the conclusion that an employee cannot be required to pay for the services of his

"judge." To like effect is *Armendariz v. Foundation Health Psychiatric Services, Inc.*, 6 P.3d 669 (Cal. 2000), in which the Supreme Court of California concluded that when an employer imposes mandatory arbitration as a condition of employment, the employee cannot be required to bear any kind of expense that he would not be required to bear if he were free to bring an action in court. The California court rejected the employer's argument that, because the employee's cost of arbitration will be less than his going to court, he should be happy with the net benefit being conferred on him. Without any precedent from the Eleventh Circuit or from the Supreme Court, this court sides with the District of Columbia Circuit and with the California court and finds that an employee cannot be required to bear any of the costs of mandatory arbitration where his employment is conditional upon his signing of an arbitration agreement.

Judge Hancock of this court has undertaken to solve this problem by requiring that the entire cost of arbitration be borne by an employer who seeks to enforce a mandatory arbitration clause, even though the written contract itself provides for the sharing of such expense. While this device is attractive, it, in effect, constitutes an

amendment to the contract between the parties. This court respectfully declines to adopt Judge Hancock's solution, which, although it meets the major criticisms leveled by the District of Columbia Circuit and the California court, creates other concerns.

3. Assuming *arguendo*, that there is nothing fundamentally wrong with making an employee share in the cost of mandatory arbitration, the question raised by Chief Justice Rehnquist in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 121 S. Ct. 513 (2000), remains, namely, whether the cost of arbitration to Butler would be "prohibitive." On this question, the burden of proof would be on Butler, that is if he knew what it was that he had to prove. Again, construing the agreement against the drafting party, any arbitration here would be "in accordance with the rules of the American Arbitration Association **or** the Alabama Bar Association Mediation Center-ARL Program" (emphasis supplied). Because the two procedures are in the alternative, Butler does not know which party is to choose between the two sets of rules, one of which may be cheaper than the other and one of which may be better than the other. Based on the present record, and without either party having purported to choose between procedures, the court is unable to address

the question of whether the cost to Butler of an arbitration would be "prohibitive." If the issue had been properly framed by movant, an interesting factual dispute would undoubtedly be presented.

4. Last but not least, the court cannot ascertain from the pleadings whether Homes of Legend has exercised its claimed right to arbitrate by "mak[ing] a written demand for arbitration" within "sixty (60) days from the date of the controversy." According to the arbitration agreement itself, this is the only way to trigger the right to arbitration. Butler's complaint alleges that he brought the controversy to the attention of Homes of Legend on July 31, 2001. Homes of Legend did not demand arbitration until the filing of its motion on November 9, 2001, much longer than 60 days after the controversy surfaced.

Conclusion

The court does not agree with Butler that this arbitration agreement did not fairly inform him that a statutory wage and hour claim would be subject to arbitration. But, for the foregoing separate and several reasons, the defendant's motion to stay and to compel arbitration will be denied by separate order.

DONE this 21st day of November, 2001.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE